

## **SAFE HARBOR AGREEMENT**

### **1. INTRODUCTION**

This Safe Harbor Agreement (Agreement) is entered into between River Partners (Applicant) and the U.S. Department of the Interior, Fish and Wildlife Service (Service); hereinafter collectively called the "Parties." The purpose of this Agreement is to enhance populations of valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*) in Glenn County, California through habitat restoration, enhancement, and management on the property owned by the Applicant. This Agreement follows the Service's Safe Harbor Agreement policy (64 FR 32717) and regulations (64 FR 32706, 69 FR 24084), which implement this policy.

Upon approval, this Agreement will serve as the basis for the Service to issue an enhancement of survival permit (Permit) pursuant to Section 10(a)(1)(A) of the Act. The Permit authorizes the incidental taking of the valley elderberry longhorn beetle associated with the restoration, enhancement, and management of riparian habitat on the property owned by the Applicant, other lawful uses of the property, and the potential future return of any eligible land to pre-Agreement conditions (baseline condition) after this Agreement expires.

### **2. LIST OF COVERED SPECIES**

This Agreement covers the federally listed valley elderberry longhorn beetle (VELB), which is hereafter referred to as the Covered Species.

### **3. DESCRIPTION OF ENROLLED LANDS**

The property subject to this Agreement consists of approximately 259 acres known as the Del Rio Wildland Preserve and is owned in fee title by River Partners (Enrolled Property). The Enrolled Property is more precisely indicated on the attached maps (Attachment A).

The Enrolled Property is located in the southeastern corner of Glenn County just south of the Llano Seco Rancho. It is approximately five miles north of Butte City and one mile east of the Sacramento River at River Mile 175L. The 259-acre property occupies flood-prone land between the Sacramento River Flood Control Project (SRFCP) setback levee and Angel Slough (Attachment A, figure 1). The Enrolled Property can be divided into the following areas:

- 27 acres of existing riparian habitat
- 96 acres of restoration project located in the East Field (former almond orchard)
- 136 acres of current walnut orchard in the West and Middle Fields

A small yard area and a swale that bisects the current walnut orchard are other notable features. Adjacent properties to the north and east are private lands protected by conservation easements managed for wildlife or owned by the Service. Prune orchards and crop fields to the south of the site are privately owned. The project is contiguous with and will complement an extensive

habitat restoration effort in the area that includes over 12,000 acres of wildlife conservation habitat on the Llano Seco Unit of the Sacramento River National Wildlife Refuge and is bordered by a seasonal wetland protected by a Wildlife Conservation Board easement on the east.

In May 2002, the Applicant received a grant from the Great Valley Center to develop a management plan for the restoration of the Enrolled Property to a Wildlife Area. The Conceptual Management Alternatives for the Enrolled Property and the State Reclamation Board permit are Appendices in the attached Riparian Restoration Plan (River Partners 2004a) (Attachment B).

In November 2003, 96 acres of former almond orchard in the East Field (Attachment A, figure 2) began transformation into the oak-woodland and savannah communities that previously inhabited the site. Currently, approximately half of the property (136 acres) remains in agricultural production in the form of walnut orchards that are also scheduled for riparian habitat restoration. The combined 232 acres of restoration acreage (Attachment A figure 2) will eventually be linked to approximately 27 acres of existing riparian forest.

Restoration on the East Field began in 2004. The Applicant is seeking funding to restore and enhance the remaining area on the Enrolled Property into high quality riparian wildlife habitat. Once restored, this unit has the potential to provide vital habitat for high priority, riparian dependent wildlife species and recreational opportunities for the public. In the long term, the property will likely be transferred to the California Department of Fish and Game once restoration is complete.

Current management practices on the site are typical of agricultural and habitat restoration activities. These include cultural practices for walnut production (*e.g.*, pesticide application, fertilizer, and weed control), levee maintenance, public access infrastructure development and maintenance, and habitat restoration activities. Habitat restoration activities will be similar to those detailed in the Restoration Plan for the East Field (Attachment B).

Many of these activities are likely to proceed into the future (*e.g.*, weed control), while others (*e.g.*, chemical application for walnut pests) are likely to fade as the land use transitions from agricultural uses toward restored riparian habitat. Weed control activities include herbicide application, disking, and mowing. Following the completion of the active phase of the riparian restoration (typically after 3-4 years), herbicide applications will be reduced to spot applications. All herbicides and pesticides will be applied in accordance with the label, and no pre-emergent herbicides will be applied.

#### **4. BASELINE DETERMINATION**

This Agreement provides a means by which the Applicant can restore and manage habitats for the VELB without incurring additional regulatory restrictions on the future use of the property. The Applicant's staff conducted site surveys on the property on July 9, 2004, and April 29, 2005, for the purpose of establishing baseline conditions. The Parties agree that the baseline conditions applicable to this Agreement are as follows:

- Zero elderberry plants were found in the West, Middle, and East fields.
- One elderberry plant was observed on the property in the existing habitat area and near a ramp road from the levee. This plant (EB-1) possessed 9 stems measuring greater than one (1) inch diameter and had a height of approximately 3 meters (m) and with a canopy diameter of 2 m. No exit holes were observed on the shrub. Heavy vegetation obscured the base of the plant during the Spring 2005 visit. This was the only elderberry plant on the entire property. Attachment C provides a photograph (figure 1) and location map (figure 2) of the elderberry plant on site.
- Approximately eight elderberry plants were observed just off the property, just west of the maintenance area along the levee. No exit holes were observed on any of these plants. No well-defined borders exist to demarcate the property line. These plants are not included as part of this agreement.

To receive the assurances regarding take of the Covered Species specified in Section 10 of this Agreement, the Applicant must maintain on the Enrolled Property at least one elderberry bush with nine or more stems measuring greater than one (1) inch in diameter (baseline conditions).

## 5. MANAGEMENT ACTIVITIES

The Applicant agrees to carry out the following management activities to benefit the Covered Species:

- Plant over 1,500 elderberry plants in a matrix of native riparian plants that will benefit a variety of riparian dependent wildlife species including the Covered Species.
- Transform 231 acres of agricultural land into riparian habitat with a diverse native plant community and high structural diversity.
- Control invasive weeds through the use of chemicals or mechanical means (e.g., mowing, weed-eating, pulling) for the benefit of elderberry survival. Competition from noxious weeds is a threat to young elderberry (*Sambucus* sp.) seedlings and herbicide use maximizes the survivorship of planted elderberry plants and increases the opportunities for VELB to colonize. In the past, the Applicant's restoration projects have shown survivorship rates greater than 70% (90-95% is certainly not unusual).

The following will guide the use of chemicals on the Enrolled Property.

- Insecticides will be used only on the walnut orchard, where no elderberries are currently in place, and they will be permanently discontinued prior to the restoration.
- Herbicide use will be typical to that on restoration sites completed by the Applicant. Surveys of several different restoration sites indicate 4% of planted elderberries had evidence (exit holes) of VELB. These elderberry plants were planted 3-10 years before. (River Partners 2004)
- Herbicide use will drop dramatically after the third year of restoration activities. After the restoration is completed, herbicides will be applied to targeted noxious weeds in discreet areas of the site. If necessary, weeds in the vicinity of elderberry shrubs with stem widths

larger than one (1) inch will be controlled through mechanical means or through the hand application of herbicides.

- Newly planted elderberries that do not survive will be replaced to achieve up to a 70% or greater survivorship three years after planting date.

All practices will be implemented in accordance with best management practices (BMP) developed in cooperation with the Service in such a manner that will result in a finding of not likely to adversely affect the species. Based on exit hole surveys (River Partners 2004b), these practices appear to support the successful recruitment of the VELB on other restoration sites.

The project is intended as a long-term change to the land use of the property. Once restored, the Applicant intends to transfer the ownership of the property to the California Department of Fish and Game or possibly the Service. In either case, the receiving agency would manage the property in the long term for wildlife and conservation purposes. Management activities would benefit the covered species and other riparian dependent organisms.

## **6. NET CONSERVATION BENEFITS**

The Service has determined that implementation of this Agreement is reasonably expected to provide a "net conservation benefit" to the covered species, because the management activities performed by the Applicant pursuant to this Agreement are expected to provide an increase in the Covered Species' population and/or enhance, restore, or maintain the Covered Species' habitat.

Specifically, implementation of the conservation measures in the Agreement are expected to result in the following net conservation benefits to the covered species:

- Enhance the probability that local metapopulations of VELB will persist by increasing habitat availability and connectivity.
- Increase the connectivity of riparian forest through the expansion of the riparian corridor and replace non-native invasive species with native trees, shrubs, sedges and grasses.
- Conduct targeted weed control in the existing habitat.
- Restore and maintain an intact ecological system of elderberry bushes and native riparian vegetation that will provide benefits to a variety of wildlife species.

The Agreement supports recovery objective #5 listed in the *Recovery Plan for the valley elderberry longhorn beetle* (USFWS 1984) by restoring habitat sites within the presumed historical range of the animal, managing this habitat by removing exotic species as necessary, and protecting these restored sites for a minimum of 20 years. In addition, the Applicant will restore native plant species typical of Valley Foothill Riparian habitats, which may encourage colonization of the planted elderberries by the VELB (River Partners, 2004), as well as provide habitat for other species.

## 7. OTHER RESPONSIBILITIES OF THE PARTIES

A. In addition to carrying out the management activities set forth in Section 5 of this Agreement, the Applicant agrees to:

1. Notification. Notify the Service in writing (email okay) at least 30 days in advance of any planned activity that the Applicant reasonably anticipates will result in "take" (*i.e.*, death or injury) of the covered species on the Enrolled Property, and provide the Service the opportunity to capture and/or relocate any potentially affected species and/or move any bushes.

2. Emergency Situations. Emergency situations, such as wild fires, floods, epidemic disease, or other factors, may require management actions not specified in this Agreement. In these situations, the Parties acknowledge that it may be impossible to provide the 30-day notice required by the Agreement prior to initiation of activities that could result in take of covered species. However, the Applicant will notify the Service as soon as reasonably possible after discovering such a situation, and will make reasonable accommodations to the Service to attempt to relocate affected individuals of the Covered Species or their host plant prior to the emergency management actions. The Parties acknowledge that relocation efforts may be precluded by certain emergency situations. The Applicant and the Service will work cooperatively to avoid impacts to Covered Species.

3. Monitoring. This Agreement provides for two types of monitoring: 1) compliance monitoring (to ensure that all commitments in the Agreement are met), and 2) biological monitoring (to ensure that the biological goals of the Agreement are being met). Surveying activities may be carried out on the Applicant's behalf by another qualified entity agreeable to the Parties.

3.1. Compliance Monitoring. The Applicant will provide the Service with an annual report due by December 31 each year for the duration of this Agreement. The report will include the Applicant's self-evaluations identifying and describing management activities undertaken to restore, enhance, or manage VELB habitat on the Enrolled Property in the preceding year. The report will also verify the maintenance of baseline conditions. Such report will also include GPS and location descriptions of any elderberry bushes newly recruited during the previous year.

3.2. Biological Monitoring. At a minimum of every 3 years and a maximum of every 5 years and for the duration of this Agreement, the Applicant will provide the Service with a Biological Monitoring Report to assess the condition of the habitat being managed thereon. Such report will detail how the restoration area has changed during the life of the project, include GPS and location description of elderberry bushes, a written description of mortality (if any) and/or recruitment of elderberry bushes, and number and location of VELB exit holes observed. Following each biological monitoring report, the

Applicant and the Service will discuss trends, successes, and failures with the intent of improving the net conservation benefit to the covered species.

4. Access. Allow reasonable access by the Service, or other agreed-upon party, to the Enrolled Property for purposes related to this Agreement, including the capture and relocation of the Covered Species or their host plant. The Service, or other agreed-upon party, will provide the Applicant no less than 72 hours notice, to the extent practicable, prior to gaining access to the site. The Applicant reserves the right to accompany the Service on visits to the Enrolled Property.

5. Transfer of Ownership. Notify the Service of any transfer of ownership, so that the Service can attempt to contact the new owner, explain the baseline responsibilities applicable to the enrolled property, and seek to interest the new owner in signing the existing Agreement, or a new Agreement to benefit listed species on the Enrolled Property

B. In consideration of the foregoing, the Service agrees to:

1. Enhancement of Survival Permit. Issue to the Applicant an enhancement of survival permit in accordance with Section 10(a)(1)(A) of the Act, authorizing take of the Covered Species as a result of restoration, maintenance, and routine activities, provided that such taking shall be consistent with maintaining baseline conditions in accordance with the terms of such permit. The permit will also authorize take for the potential future return of the Enrolled Property to baseline conditions.
2. Technical Assistance. Provide the Applicant technical assistance, to the maximum extent practicable, when requested; and provide information on Federal funding programs.

## **8. OTHER LANDOWNERS WHO MAY SECURE INCIDENTAL TAKE AUTHORIZATION**

Landowners who own land that immediately abuts the Enrolled Property may, without committing to undertake any management activities described in Section 5 of this Agreement on such adjoining land, secure the incidental take authority conferred by the permit issued by the Service to the Applicant pursuant to Section 7.B.1 of this Agreement, provided: (1) such adjoining landowner enters into a written agreement with the Service; (2) such written agreement specifies the baseline conditions on such adjoining property; (3) the Service, or an entity approved by the Service, may access the property for monitoring purposes and for capture and translocation of the Covered Species or their host plant in the case of significant land-use modification; and (4) The Service will be notified in advance of significant land-use modification. An annual report will be provided by the neighbor to the Service. The report shall describe any changes in the baseline habitat conditions and where or when the Covered Species or its host plant has been seen on the property. With the concurrence of the Service, baseline conditions may be established with current aerial photos or other relevant documentation.

## **9. AGREEMENT AND PERMIT DURATION**

The Agreement becomes effective upon issuance by the Service of the Section 10(a)(1)(A) permit described in Section 7 of this Agreement, and will be in effect for 20 years. When the Service determines that the conservation actions identified in the Agreement have been implemented, then the Applicants need not perform additional conservation activities on the property and the Section 10 permit may continue in effect following termination of the Agreement for an additional 5 years. In such case, the Section 10 permit authorizing incidental take of VELB will be for a duration of 25 years from the effective date of the permit, allowing the Applicant an additional 5 year to return to baseline. This Agreement and the permit described in Section 7 of this Agreement may each be extended for a further period by mutual written consent of the Parties.

## **10. ASSURANCES TO THE APPLICANT REGARDING TAKE OF COVERED SPECIES**

Provided that such take is consistent with maintaining the baseline conditions identified in Section 4 of this Agreement, the Section 10 (a)(1)(A) permit referenced in Section 7.B.1 of this Agreement shall authorize the Applicant to take the Covered Species incidental to otherwise lawful activities in the following circumstances:

1. Implementing the management activities identified in Section 5 of this Agreement.
2. Carrying out any other lawful activity that may cause the incidental taking of such species on the Enrolled Property after initiation of and consistent with such management activities, provided that such taking does not reduce the amount of habitat below the amount specified in the Baseline Conditions.
3. Flood control management activities conducted or authorized by the Department of Water Resources, including management of levees, weirs, bypasses, and/or other flood relief structures, drains and gates.
4. Herbicide use in accordance with conditions specified in Section 3 of this Agreement, per the label instructions, and per local regulations.
5. Returning to baseline conditions.

## **11. MODIFICATIONS**

A. Modification of the Agreement. Either party may propose amendments to this Agreement, as provided in 50 CFR 13.23, by providing written notice to, and obtaining the written concurrence of, the other Party. Such notice shall include a statement of the proposed modification, the reason for it, and its expected results. The Parties will use their best efforts to respond to

proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon the other Parties' written concurrence.

B. Termination of the Agreement. As provided for in Part 12 of the Service's Safe Harbor Policy (FR 64 32717), the Applicant may terminate the Agreement for circumstances beyond the Applicant's control. In such circumstances, the Applicant may return the Enrolled Property to baseline conditions even if the management activities identified in Section 5 of this Agreement have not been fully implemented, provided that the Applicant gives the Service the notification required by Section 7.A.1 above prior to carrying out any activity likely to result in the taking of the Covered Species. If the Applicant terminates the Agreement for any other reason, the permit referenced in Section 7.B.1 above shall immediately cease to be in effect.

C. Permit Suspension or Revocation. The Service may suspend or revoke the permit referred to in Section 7.B.1 above for cause in accordance with the laws and regulations in force at the time of such suspension or revocation. The Service also, as a last resort, may revoke the permit if continuation of permitted activities would likely result in jeopardy to the covered species (50 CFR 13.28(a)). In such circumstances, the Service will exercise all possible measures to avoid revoking the permit.

## **12. OTHER MEASURES**

A. Remedies. Each party shall have all remedies otherwise available to enforce the terms of the Agreement and the permit, except that no party shall be liable in damages for any breach of this Agreement, any performance or failure to perform an obligation under this Agreement or any other cause of action arising from this Agreement.

B. Dispute Resolution. The Parties recognize that disputes concerning implementation of, compliance with, or termination of, this Agreement may arise from time to time. The Parties agree to work together in good faith to resolve any disputes, using dispute resolution procedures agreed upon by all Parties.

C. Succession and Transfer. As provided in Part 11 of the Service's Safe Harbor Agreement Policy, if the Applicant transfers its interest in the enrolled property to a non-Federal entity, the Service will regard the new owner as having the same rights and responsibilities with respect to the Enrolled Property as the Applicant, if the new property owner agrees to become a party to this Agreement and the permit referenced in Section 7.B.1 of this Agreement in place of the Applicant.

D. Availability of Funds. Implementation of this Agreement by the Service is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any funds from the U.S. Treasury. The Parties acknowledge that the Service will not be required under this Agreement to expend any Federal agency's appropriated funds unless



and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

E. Relationship to Other Agreements. A number of conservation-oriented agreements are associated with the property. The land was purchased and part of the restoration came from Wildlife Conservation Board grants. Funding for restoration has been provided from the Service's Partners for Fish and Wildlife Program. The Applicant will pursue additional funding to complete the restoration on the site. All of these activities are consistent with the management of the property for conservation purposes. Once restoration and public access improvements on the property are complete, the property will be transferred to the California Department of Fish and Game or the Service and managed in the long-term for conservation purposes.

F. No Third-Party Beneficiaries. This Agreement does not create any new right or interest in any member of the public as a third-party beneficiary, nor shall it authorize anyone not a party to this Agreement to maintain a suit for personal injuries or damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing law.

G. Other Listed Species, Candidate Species, and Species of Concern. Although the Service regards it as unlikely, the possibility exists that other listed, proposed, or candidate species, or species of concern may occur in the future on the enrolled property as a direct result of the management actions specified in Section 5 of this Agreement. If that occurs and the Applicant so requests, the Parties may agree to amend the Agreement and associated permit to cover additional species and to establish appropriate baseline conditions for such other species.

H. Notices and Reports. Any notices and reports, including monitoring and annual reports, required by this Agreement shall be delivered to the person listed below:

**Service:**

Project Leader  
Sacramento Fish and Wildlife Office  
U.S. Fish and Wildlife Service  
2800 Cottage Way, Room W-2605  
Sacramento, CA 95825

**Literature Cited**

River Partners. 2004a. Riparian Restoration Plan for Del Rio Wildland Preserve (East Field), Glenn County, California. March 22, 2004. Dan Efseaff, Paul Kirk, and Helen Swagerty. Chico, California.

River Partners. 2004b. Survey of Planted Elderberry on Sacramento River National Wildlife Refuge Riparian Restoration Sites for Use by Valley Elderberry Longhorn Beetles. Tehama, Butte and Glenn County, California. Helen Swagerty and Scott Chamberlain. Chico, California.

Sacramento River Partners. 2002. Conceptual Management Alternatives for the Del Rio Property. October 11, 2002. Dan Efseaff and Carol Wright. Chico, California.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Safe Harbor Agreement to be in effect as of the date that the Service issues the permit referred to in Section 7.B.1 above.

Applicant



Date

6/20/08

Acting Field Supervisor  
Sacramento Fish and Wildlife Office  
U.S. Fish and Wildlife Service



Date

6/22/08